Supreme Court, U.S.
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No. 04 14

IN THE

Supreme Court of the United States

AIR LIQUIDE AMERICA L.P., *et al.*,

Petitioners,

v.

U.S. ARMY CORPS OF ENGINEERS and
PORT OF HOUSTON AUTHORITY OF
HARRIS COUNTY, TEXAS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Fifth Circuit violate the Water Resources Development Act of 1986 ("WRDA-86") by allowing the U.S. Army Corps of Engineers to impose substantial non-federal costs for a federal-state navigation project on private pipeline owners?

2. Did the Fifth Circuit improperly defer to an application of WRDA-86 adopted by the U.S. Army Corps of Engineers to thwart congressional intent that allocation of non-federal costs between the Port of Houston and private pipeline owners should be determined by state law?

LIST OF PARTIES

The petitioners are Air Liquide America L.P., f/k/a Air Liquide America Corporation; Chevron Phillips Chemical Company LP, f/k/a Chevron Chemical Company LLC; Chevron Pipe Line Company d/b/a ChevronTexaco Pipeline Company; EGP Fuels Company; Shell Pipeline Company LP, f/k/a Equilon Pipeline Company LLC; Florida Gas Transmission Company; Houston Pipe Line Company LP, f/k/a Houston Pipe Line Company; HSC Pipeline Partnership, L.P.; Seadrift Pipeline Corporation; TEPPCO Crude Oil, L.P., f/k/a TEPPCO Crude Oil, LLC; TE Products Pipeline Company, Limited Partnership; Texas Eastern Transmission, LP, f/k/a Texas Eastern Transmission Corporation; UCAR Pipeline Incorporated; Black Marlin Pipeline Company; Kinder Morgan Tejas Pipeline, L.P., f/k/a Tejas South Pipeline Partnership; and Kinder Morgan Tejas Pipeline, L.P., f/k/a Tejas Ship Channel, LLC.

The respondents are the U.S. Army Corps of Engineers and the Port of Houston Authority of Harris County, Texas.

Dynegy Midstream Services, Limited Partnership, ExxonMobil Pipeline Company f/k/a Exxon Pipeline Company, Air Products, L.P. f/k/a Air Products, Incorporated, and Air Products Manufacturing Corporation were appellees below; they are not among the petitioners and therefore are identified as respondents in this petition.

DISCLOSURE STATEMENT FOR CORPORATE PETITIONERS

Petitioner Chevron Pipe Line Company d/b/a ChevronTexaco Pipeline Company is wholly owned by ChevronTexaco Global Energy Inc., an indirect subsidiary of Texaco Inc. and ChevronTexaco Corporation.

Petitioner EGP Fuels Company is wholly owned by Enron Corp.

Petitioner Florida Gas Transmission Company is wholly owned by Citrus Corp.

Petitioner Seadrift Pipeline Corporation is wholly owned by Union Carbide Corporation.

Petitioner UCAR Pipeline Incorporated is wholly owned by Union Carbide Corporation.

Petitioner Black Marlin Pipeline Company is wholly owned by Williams Field Services Group, Inc.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of Parties	ii
Disclosure Statement for Corporate Petitioners	iii
Table of Contents	iv
Table of Cited Authorities	vii
Table of Appendices	x
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provision Involved	2
Statement of the Case	2
A. Congress Enacted WRDA-86 To Allocate Costs For Navigation Projects Between The Federal Government And Local Sponsors	3
B. WRDA-86 Defers To State Law To Determine Payment Of Relocation Costs	4
C. The Corps Acknowledged That Under WRDA-86 The Port Had To Pay For Utility Relocations Required To Deepen And Widen The Channel	5

Contents

Page

D. At The Port's Behest, The Corps Reversed Its Longstanding Position On Who Must Pay For Utility Relocations 6

E. Contrary To WRDA-86, The Corps Ordered Utility Pipeline Relocations "At Owner Expense" 8

F. The Fifth Circuit Allowed The Corps To Impose The Full Expense Of Utility Relocations On Owners 9

Reasons for Granting the Petition 11

I. The Fifth Circuit Improperly Allowed The Corps To Decide Cost Issues Between Non-Federal Parties In Contravention Of Congressional Intent And WRDA-86 15

A. Congress Chose State Law To Allocate Non-Federal Expenses Among Non-Federal Entities 15

B. The Fifth Circuit's Analysis Thwarts Congressional Intent And Contravenes Principles Of Federalism 17

1. The Fifth Circuit endorsed use of the navigational servitude to trump congressional intent 17

Contents

Page

2. The Fifth Circuit opinion renders WRDA-86's cost-sharing formulas meaningless 20

3. The Fifth Circuit's ruling also contravenes federalism principles 22

II. The Fifth Circuit Erred In Deferring To An Agency Application Of WRDA-86 That Subverts Clear Congressional Intent To Make The Port Responsible For Utility Relocations 23

A. The Corps' Application Of WRDA-86 Contravenes Congressional Intent 23

B. The Corps' New Interpretation Of WRDA-86 Should Be Rejected In The Absence Of A Clear Indication Of Congress' Desire To Expand The Navigational Servitude 25

Conclusion 27

TABLE OF CITED AUTHORITIES

Page

CASES

Air Liquide America Corp.v. U.S. Army Corps of Eng'rs, 359 F.3d 358 (5th Cir. 2004) 1

Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Auth., 464 U.S. 89 (1983) 22

Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) 13, 14, 24-25

Christensen v. Harris County, 529 U.S. 576 (2000) 24

Dunn v. Commodity Futures Trading Comm'n, 519 U.S. 465 (1997) 21

FDIC v. Faulkner, 991 F.2d 262 (5th Cir. 1993) 20

Federal Labor Relations Auth. v. Aberdeen Proving Ground, 485 U.S. 409 (1988) 21

General Dynamics Land Sys., Inc. v. Cline, 124 S. Ct. 1236 (Feb. 24, 2004) 13-14, 25

Gibson v. United States, 166 U.S. 269 (1897) 18

Cited Authorities

Page

Goodyear Atomic Corp. v. Miller,
486 U.S. 174 (1988) 20

Lambert Gravel Co. v. J.A. Jones Constr. Co.,
835 F.2d 1105 (5th Cir. 1988) 18, 20

Penn Dairies, Inc. v. Milk Control Comm'n,
318 U.S. 261 (1943) 22

Solid Waste Agency v. United States Army Corps of Eng'rs,
531 U.S. 159 (2001) 14, 25, 26

St. Louis, I.M. & S. Ry. v. United States,
251 U.S. 198 (1920) 20

Texas v. United States,
730 F.2d 339 (5th Cir. 1984) 22

United Texas Transmission Co. v. United States Army Corps of Eng'rs,
7 F.3d 436 (5th Cir. 1993) 19

STATUTES

28 U.S.C. § 1254(1) 1

33 U.S.C. § 1344(a) 25

33 U.S.C. § 2201 3

33 U.S.C. § 2211 2

Cited Authorities

	Page
33 U.S.C. § 2211(a)(1)	4
33 U.S.C. § 2211(a)(4)	4, 10, 15, 16
33 U.S.C. § 2211(e)	9
33 U.S.C. § 2219	3
33 U.S.C. § 2241	3
42 U.S.C. § 1962d-5b(a)	9
TEX. WATER CODE ANN. § 60.102(a) (Vernon 1988)	*passim*
REGULATIONS	
33 C.F.R. § 209.260(e)(1)	25
MISCELLANEOUS	
H.R. CONF. REP. No. 99-1013 (1986)	*passim*
S. REP. No. 104-170, *et seq.*	20
Water Resources Development Act of 1996 Pub. L. No. 104-303, 110 Stat. 3658	8
OP. TEX. ATT'Y GEN. No. MW-412 (1981)	16

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Fifth Circuit Filed January 30, 2004 ..... 1a

Appendix B — Opinion, Order And Judgment Of The United States District Court For The Southern District Of Texas Entered January 25, 2002 .... 18a

Appendix C — Order Of The United States Court Of Appeals For The Fifth Circuit Denying Petition For Rehearing Filed April 1, 2004 ..... 28a

Appendix D — Relevant Statute 32a

This petition seeks a writ of certiorari to review a decision of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The trial court's opinion on summary judgment is unpublished. The trial court's opinion and judgment were entered in Civil Action No. H-98-3982, *Air Liquide America Corp., et al. v. U.S. Army Corps of Engineers, et al.*, in the United States District Court for the Southern District of Texas, Houston Division. *See* Pet. App. at 18a-27a.[1]

The court of appeals' opinion is published as *Air Liquide America Corp. v. U.S. Army Corps of Engineers*, 359 F.3d 358 (5th Cir. 2004). *See* Pet. App. at 1a-17a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed was entered on January 30, 2004. A petition for rehearing en banc was timely filed. The petition was denied on April 1, 2004. *See* Pet. App. at 30a-31a.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

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1. The record on appeal consists of multiple bound volumes of pleadings prepared and sequentially numbered by the district court clerk. The record is cited in this petition as "__R.__," citing first by volume and then by page. The appendix to the petition for writ of certiorari is cited as "Pet. App."

STATUTORY PROVISION INVOLVED

The relevant portions of 33 U.S.C. § 2211 are reproduced in the appendix to this petition. *See* Pet. App. at 32a.

STATEMENT OF THE CASE

The petitioners own or operate dozens of transmission pipelines that cross under the Houston Ship Channel ("Channel"). Owners' pipelines operate in both interstate and intrastate commerce transporting crude oil, natural gas, refined products, liquefied petroleum gases, industrial gases, and chemicals under the Channel. 2R.247. Each pipeline holds a permit from the Corps. 14R.3640-3811; 22R.5603-5606; 22R.5638-5641; 22R.5655-5656.

The Houston-Galveston Navigation Channel, Texas Project ("Project") necessitated relocation of pipelines so that the Channel can be deepened and widened. 1R.5781. By the Corps' count, the Project required relocation of 123 pipelines at an aggregate cost of at least $115 million. 8R.1966-1968, 2113. Owners' pipelines were included in this total. *Id.* The Corps sent "Notice to Remove" letters to Owners at the Port's urging, ordering Owners to relocate their pipelines at their own expense. 1R.5781.

This directive to relocate at Owners' expense runs directly counter to congressional intent as stated in WRDA-86. Relying on the Corps' ability to invoke the navigational servitude to compel relocation, the Fifth Circuit erroneously allowed the Corps to seize control of the cost allocation issue, improperly expanding the navigational servitude and directly contravening congressional intent. Pet. App. at 9a-14a.

A. Congress Enacted WRDA-86 To Allocate Costs For Navigation Projects Between The Federal Government And Local Sponsors

The Channel has been widened or deepened several times since its creation in the late nineteenth century. A feasibility study completed in 1987 advocated deepening the Channel to 50 feet. This proposal roughly coincided with the enactment of WRDA-86, now codified at 33 U.S.C. §§ 2201 et seq. WRDA-86 broke with a history of *ad hoc* commitment of federal dollars to navigation projects and established a uniform policy of cost-sharing with local sponsors on future navigation projects.

Under WRDA-86, projects for harbor and navigation channel construction require sponsorship and financial commitment not only from the federal government, but also from a local sponsor or "non-Federal interest."[2] The local sponsor is required to pay:

> (A) 10 percent of the cost of construction of the portion of the project that has a depth not in excess of 20 feet; plus
>
> (B) 25 percent of the cost of construction of the portion of the project that has a depth in excess of 20 feet but not in excess of 45 feet; plus

---

2. Under 33 U.S.C. §§ 2219 and 2241, a "non-Federal interest" is a "legally constituted public body with full authority and capability to perform the terms of its agreement and to pay damages, if necessary, in the event of failure to perform." The Port is the non-federal interest, or local sponsor, of the Project. 2R.232, 237.

> (C) 50 percent of the cost of construction of the portion of the project which has a depth in excess of 45 feet.

33 U.S.C. § 2211(a)(1).

In the case of utilities that must be moved to make way for a project (such as Owners' pipelines), the local sponsor must

> ***perform or assure the performance of all relocations of utilities necessary to carry out the project***, except that in the case of a project for a deep-draft harbor . . . one-half of the cost of each such relocation shall be borne by the owner of the facility being relocated and one-half of the cost of each such relocation shall be borne by the non-federal interests.

33 U.S.C. § 2211(a)(4) (emphasis added). The Port is the local sponsor of the Project. 2R.232, 237.

B. WRDA-86 Defers To State Law To Determine Payment Of Relocation Costs

For pipeline relocation costs, WRDA-86 adopts the rule that state law decides which party – local sponsor or facility owner – must shoulder utility relocation costs associated with the joint federal/state navigation project. H.R. CONF. REP. NO. 99-1013, at 205 (1986). Thus, except in the case of a deep-draft harbor, WRDA-86 leaves to state law the question of who must bear relocation costs. When a navigation district such as the Port requires relocation or removal of a pipeline, Texas law provides that the navigation district must

bear the costs at its "sole expense." TEX. WATER CODE ANN. § 60.102(a) (Vernon 1988).

C. The Corps Acknowledged That Under WRDA-86 The Port Had To Pay For Utility Relocations Required To Deepen And Widen The Channel

The Corps and Port acknowledged that the Project's local sponsor – the Port – would bear the costs of relocating utilities such as Owners' pipelines. In the 1987 feasibility study, the Corps concluded:

> In accordance with Public Law 99-662 [WRDA-86], ***non-federal interests [i.e., the Port] would be responsible for . . . [a]ll relocations and alterations of utilities, pipelines, cables, and sewer outlets necessary for the project***, except that in the case of a deep-draft harbor, one-half of the cost of utility relocations shall be borne by the owner of the facility being relocated and one-half of the cost of each such relocation shall be borne by the non-federal interests.

7R.1642 (emphasis added). For nine years thereafter, the Corps consistently acknowledged the local sponsor should bear these costs. *E.g.*, 12R.3221 (in August 1993, identifying "Structure and Pipeline Relocations" as non-federal sponsor costs).

D. At The Port's Behest, The Corps Reversed Its Longstanding Position On Who Must Pay For Utility Relocations

Because of difficulties in justifying the Project economically and environmentally, the Corps and Port opted in 1993 to undertake a shallower project with a 45-foot "design depth" over most of its length. The Port still complained about various elements of the Project's cost estimate, including the "cost of relocations" of Owners' pipelines "even though to our knowledge the existing pipelines have not changed." 12R.3234. The Corps acknowledged that "cost of [pipeline] relocations has increased," but observed that it was because the number of affected pipelines increased. 12R.3228. Later, the Port admonished the Corps, "We have a tremendous problem with pipelines that is unique to the Texas Gulf Coast. Failure of the Corps to use its authority would in all likelihood kill this project." 12R.3052.

Until this point, Corps policy had recognized, in conformity with WRDA-86, that it was "the basic responsibility of the local [i.e., non-federal] sponsor to assure that utilities are relocated at non-Federal expense." Policy Guidance Letter No. 8 ("PGL 8"). 12R.3279. Corps policy correctly held that this assignment of responsibility did not determine who, as between the local sponsor and the owner, ultimately "absorb[ed] the costs." *Id.* This approach was required by the statutory language and by the Conference Report's directive that the issue of who should bear relocation costs would be "resolved between the non-Federal interest and the owners of the facilities being relocated." H.R. CONF. REP. No. 99-1013, at 205.

In response to the Port's importuning, the Corps reversed its policy for the purpose of shifting costs from the Port to Owners notwithstanding WRDA-86. The Corps circulated its draft to the Port. 12R.3075-3088. The Port and Corps agreed that further development of the policy would be treated as "a *partnership* issue and decision, not to be decided unilaterally by the Corps." 12R.3069 (emphasis in original).

The new draft policy sought to shift to Owners the cost of utility relocations when the Port claimed it lacked the ability to force a relocation ***at the owners' cost***. The Port's general counsel warned that TEXAS WATER CODE § 60.102(a) required the Port, not Owners, to bear relocation costs. She concluded that the Port lacked the authority to require the pipelines to relocate *at owner cost*, and that any attempt to do so might result in an unacceptable delay in starting work on the Project. 2R.241. The Port's outside counsel and the Corps' counsel concurred. 2R.239-240; 9R.2350D-2350; 9R.2254-2275.

This effort to shift costs was reflected in the two-volume Limited Reevaluation Report and Supplemental Environmental Impact Statement ("LRR"), which the Corps' Galveston district engineer issued principally to address the Project's environmental concerns. Buried in the two volumes were suggestions that Owners' pipelines should be "removed" along with "other obstructions to the channel improvements." 8R.1981. Reflecting the Corps' policy reversal, the LRR asserted that "cost for removal and replacement of pipelines . . . are not included in the baseline cost estimate because ***these costs are owner costs, not project costs.***" 8R.2000A (emphasis added). According to the LRR, this conclusory assertion allegedly was based on the Corps' "current policy," or Policy Guidance Letter No. 44 ("PGL 44"), which

formalized the Corps' draft policy and was issued about two weeks before the date of the LRR. 9R.2215-2224.

In May 1996, the Corps presented Congress with a Chief's Report making recommendations regarding the Project. This Report did not propose any change to Congressional policy as set forth in WRDA-86. To the contrary, the Report noted that it was "[b]ased upon existing cost sharing policy" and further recommended implementation of the proposed project "generally" in line with the LRR, "subject to applicable cost-sharing and financing requirements." 8R.2112-2113. Because Congress had not amended the nation's water project policy in any material respect since adopting the cost-sharing formulas in WRDA-86, the Chief's invocation of "existing cost sharing policy" necessarily referred to WRDA-86. Closely paraphrasing WRDA-86, the Chief's Report also restated the requirement that "the non-federal sponsors shall . . . provide all lands . . . and perform or ensure the performance of all relocations determined by the federal Government to be necessary. . . ." 8R.2112.

E. Contrary To WRDA-86, The Corps Ordered Utility Pipeline Relocations "At Owner Expense"

In the Water Resources Development Act of 1996, Pub. L. No. 104-303, 110 Stat. 3658 ("WRDA-96"), Congress authorized approximately 100 new projects, including 31 "Projects With Chief's Reports." 17R.4497-4626. With respect to the latter group, which included the Project, Congress noted that they were "to be carried out . . . substantially in accordance with the plans, and subject to the conditions, described in the respective reports. . . ." WRDA-96 § 101(a) (17R.4623). The Project was authorized

as a cost-sharing project in which the Corps represented the federal interest and the Port constituted the local or non-federal interests. 2R.237.

Under WRDA-86 and other applicable federal statutes, the execution of a Project Cooperation Agreement, or "PCA," was a necessary pre-condition to the commencement of construction on all federally-subsidized water projects. *See* 33 U.S.C. § 2211(e); 42 U.S.C. § 1962d-5b(a). The Corps signed a PCA with the Port on June 10, 1998. 2R.237; 7R.1263-1307. Five days later, the Corps began sending notices requiring Owners to remove their pipelines to accommodate the Project, directing that "[a]ll removals and any subsequently permitted relocations . . . shall be accomplished at owner expense." Owners subsequently relocated their pipelines.

F. The Fifth Circuit Allowed The Corps To Impose The Full Expense Of Utility Relocations On Owners

On November 25, 1998, Owners sued the Corps in the United States District Court for the Southern District of Texas, Houston Division, seeking a declaration that the Notice to Remove letters, which ordered Owners to pay all relocation costs, were void as an unauthorized exercise of federal power. 2R.20-22.[3] A Consolidated Complaint was

3. Owners also sued the Port in Texas state court seeking a declaration that the Port had required the relocation of their pipelines within the meaning of TEXAS WATER CODE § 60.102(a), so that the Port was responsible for 100% of the relocation costs. Owners also alleged that the Port was taking their property without just compensation in violation of the United States and Texas Constitutions. 18R.30-33. In the alternative, Owners sought a declaration in the state-court suit that the Project is a deep-draft harbor project under WRDA-86, so that the Port must pay 50% of the (Cont'd)

filed on February 5, 1999. 2R.139-182. Additional Owners intervened. 19R.4834-4835; 22R.5550. The Port and Corps answered, and the Port counterclaimed for a declaration that Owners must bear all pipeline relocation costs. 2R.204-212; 2R.223-235.

On March 26, 1999, the parties filed stipulated facts. 2R.230-248. On April 30, 1999, Owners moved for summary judgment on all claims except the takings claim. 19R.4865-4871. The Port and Corps responded and filed cross-motions for summary judgment. 19R.4902-4906; 20R.4907-5265; 21R.5267-5311; 21R.5373-5377.

On January 25, 2002, the district court issued an order and final judgment with an accompanying opinion. 1R.5775-5781; Pet. App. at 18a-27a. The district court granted Owners' motion, in part; denied the Port's and the Corps' motions; and dismissed all other claims without prejudice. 1R.5775-5781. The district court held that WRDA-86 controlled the cost-allocation determination for the Project, and that under Texas law the Port was to bear the relocation costs. Pet. App. at 7a, 23a-24a. The district court denied Owners' request for summary judgment on the alternative claim that the Project is a deep-draft harbor. 1R.5775-5781.

The Fifth Circuit affirmed in part and reversed in part.[4]

(Cont'd)

relocation costs. 18R.31-32. The Port removed the second case to federal court, where proceedings were consolidated. 18R.52; 2R.84. The Port expressly waived any Eleventh Amendment immunity. 2R.237.

4. Insofar as the Fifth Circuit affirmed the district court's judgment, it held that the Project is not a deep-draft harbor for purposes of 33 U.S.C. § 2211(a)(4). Pet. App. at 17a. Petitioners do not challenge this portion of the Fifth Circuit's judgment.

On the issue of whether Owners or the Port must bear full relocation costs, the Fifth Circuit held that "the Corps properly exercised its navigational servitude over the pipelines and waterway covered by the [Owners'] . . . permits, requiring Owners to remove those pipelines at their expense." Pet. App. at 16a. Reasoning that the Corps rather than the Port had required the pipeline relocations at issue, the Fifth Circuit held that section 60.102(a) of the TEXAS WATER CODE requiring payment by the Port did not apply. Pet. App. at 9a ("This provision is not applicable because the Port did not *require* relocation – the Corps did") (original emphasis). Based on this conclusion, the Fifth Circuit held that "it is not necessary to resolve whether WRDA-86 or WRDA-96" controls" because "in any event, Tex. Water Code § 60.102 does *not* apply." *Id.* (original emphasis).

REASONS FOR GRANTING THE PETITION

This Court should grant Owners' petition for a writ of certiorari because the Fifth Circuit's judgment in this case erroneously expands the constitutional navigational servitude doctrine, allowing the Corps to seize control of non-federal cost issues and to substitute its policy for congressional mandates.

The navigational servitude arises from the Commerce Clause and accordingly is a power belonging to Congress. This power has been delegated to the Corps, although Congress retains the prerogative not to use it. By invoking the navigational servitude, the Corps can require removal of obstructions from navigable waters at no cost to the federal government.

As interpreted and expanded by the Fifth Circuit, the navigational servitude not only authorizes the Corps to remove obstructions without cost to the ***federal*** government, but also authorizes the Corps to (1) impose these costs on property owners; and (2) shield ***local*** governments and other non-federal parties from state law reimbursement rules. This ruling

- improperly expands the navigational servitude beyond its constitutional purpose and limits;

- interferes with congressionally mandated rules that place responsibility for removal costs on the local public sponsor, rather than on private property owners;

- contravenes principles of federalism by improperly overriding state law, including state-imposed constraints on one of its political subdivisions;

- effectively prevents private property owners from factoring in the risk of or otherwise managing possible removal costs, thereby deterring private capital investment in and near the nation's ports; and

- defers unjustifiably to a Corps policy in derogation of an unambiguous statute.

Whether the federal government can invoke the servitude to ensure that it will not bear removal costs is not at issue. The issue is whether the servitude empowers the Corps to be

the judge of how ***non-federal*** costs are allocated among ***non-federal*** entities, in contravention of both federal and state statutes.

Given the nature of water projects, these non-federal costs are substantial; in this case alone, the Project required relocations of 123 pipelines at an aggregate cost exceeding $115 million. 8R.1966-1969, 2113. The magnitude of this expense confirms that this Court's intervention is warranted without regard to whether a circuit split exists. The conclusion is underscored by the sheer number of port and harbor projects nationwide where pipeline and utility relocation issues are likely to arise.

The plain language of WRDA-86 unequivocally establishes Congress' determination that the local sponsor for a navigation project – not the Corps – is responsible for the relocation of any utilities, including pipelines. If the local sponsor has the ability to shift those costs to the owner under local law it may do so, but Congress refrained from deciding that question and did not authorize the Corps to decide it.

When Congress unambiguously states its intent, as it has in WRDA-86, an executive agency such as the Corps has no right to second-guess Congress' choice. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) (when Congress' intent "is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress").

By like token, no deference is warranted towards an agency determination that contravenes unambiguous statutory language. *General Dynamics Land Sys., Inc. v. Cline*, 124

S. Ct. 1236, 1248 (Feb. 24, 2004). "Even for an agency able to claim all the authority possible under *Chevron*, deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." *Id.* When the agency's position is "clearly wrong" because it contravenes express statutory language, that position must be rejected. *See id.*

The Fifth Circuit further erred by deferring to an untenable interpretation adopted in anticipation of this litigation under circumstances when deference is not warranted. In this regard, the panel opinion is inconsistent with *Solid Waste Agency v. United States Army Corps of Engineers*, 531 U.S. 159 (2001).

Without regard to the existence or absence of a circuit split, this Court in *Solid Waste Agency* recognized that intervention was warranted to address an overreaching Corps interpretation of a statute – especially when that interpretation is inconsistent with an earlier Corps interpretation of the same statute. *See id.* at 166-68.

The same circumstances exist here and point toward granting certiorari.

I. The Fifth Circuit Improperly Allowed The Corps To Decide Cost Issues Between Non-Federal Parties In Contravention Of Congressional Intent And WRDA-86

A. Congress Chose State Law To Allocate Non-Federal Expenses Among Non-Federal Entities

WRDA-86 allocates responsibilities between the federal government and the local public sponsor – in this case, the Port. When utilities such as Owners' pipelines must be moved to make way for a project (other than a deep-draft harbor), the ***local public sponsor*** must "***perform or assure the performance of all relocations*** of utilities necessary to carry out the project. . . ." 33 U.S.C. § 2211(a)(4) (emphasis added).

For pipeline relocation costs, Congress chose state law to decide which party – the local public sponsor or facility owner – must shoulder relocation costs associated with a joint federal/state navigation project. As stated in the Conference Report that accompanied the final version of WRDA-86:

> For projects involving depths of forty-five feet or less, the legislation does not restrict in any way the manner in which the non-Federal interest [*i.e.*, local public sponsor] finances the relocation. If the non-Federal interest has the authority to compel the owner of the facility to pay relocation costs, it may do so. By the same token, the non-Federal sponsor may pay as much of the relocation costs as may be required or appropriate.

> ***This question is to be resolved between the non-Federal interest and the owners of the facilities being relocated.***

H.R. CONF. REP. No. 99-1013, at 205 (1986) (emphasis added). Whether the local public sponsor, an organ or instrumentality of the state, must pay (or has authority to compel owners to pay) relocation costs is governed by state law. Thus, except in the case of a deep-draft harbor, WRDA-86 defers to state law.[5]

Responsibility for pipeline relocations is spelled out in 33 U.S.C. § 2211(a)(4), entitled "Utility Relocations." *See* Pet. App. at 33a. It provides that the "non-federal interests . . . shall perform or assure the performance of all relocations of utilities necessary to carry out the project. . . ." The Port is the non-federal interest, or local sponsor, for the Project. Hence, as between the Port and the Corps, it is the Port that Congress has directed to "perform or assure the performance" of all utility relocations occasioned by the Project.[6]

Under WRDA-86, therefore, and with respect to navigation projects other than deep-draft harbors, the local

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5. Under Texas law, when a navigation district such as the Port requires relocation or removal of a pipeline, the navigation district must bear the costs at its "sole expense." TEX. WATER CODE ANN. § 60.102(a) (Vernon 1988). Relocation is "required" for these purposes if necessitated by a district-approved project. OP. TEX. ATT'Y GEN. No. MW-412 (1981).

6. The Corps acknowledged this determination in its first policy statements issued after the enactment of WRDA-86. *See* Corps Policy Guidance Letter No. 8 (May 19, 1988) § 3 (12R.3278-3279); Corps Policy Guidance Letter No. 9 (June 13, 1988) § 3. 12R.3274-3276.

sponsor – not the United States – is responsible for utility relocations. The Senate and House conferees stated this language "does not restrict in any way the manner in which the non-federal interest ***finances*** the relocation" of any "pipelines, cables, and related facilities. . . ." H.R. CONF. REP. No. 99-1013, at 205 (15R.3841) (emphasis added). Thus, Congress placed the burden of relocation on the local sponsor but refrained from deciding who, as between the local sponsor and the owner, would bear the relocation costs. It said, "This question is to be resolved between the non-federal interest and the owners of the facilities being relocated." *Id.*

B. The Fifth Circuit's Analysis Thwarts Congressional Intent And Contravenes Principles Of Federalism

1. The Fifth Circuit endorsed use of the navigational servitude to trump congressional intent

The Fifth Circuit's opinion allows congressional intent to be thwarted by (1) allowing the Corps to invoke the navigational servitude at the Port's request, thereby reversing the assignment of responsibilities for relocation costs made by Congress in WRDA-86; and (2) concluding that this action prevents Owners from recovering that expense under state law. The panel erroneously concluded that this maneuver relieved the Port of its state law responsibility because the Corps, rather than the Port, "required" the pipeline relocations. *See* Pet. App. at 9a.

The navigational servitude is a power held by Congress under the Commerce Clause. It allows Congress to require

removal of navigational obstructions ***at no cost to the United States***. *Gibson v. United States*, 166 U.S. 269, 271-72 (1897). Congress delegated this power to the Corps under the River & Harbors Act of 1899, although Congress retains the prerogative "not to assert the navigational servitude. . . ." *Lambert Gravel Co. v. J.A. Jones Constr. Co.*, 835 F.2d 1105, 1110 (5th Cir. 1988). When the servitude is exercised, the owner frequently must bear the cost. But the servitude does not prohibit a party other than the owner – such as an insurer, indemnitor, or state governmental subdivision – from paying the cost.

A central premise of the panel opinion is this: The Port did not "require" relocation of the pipelines at issue because the Corps did so. *See* Pet. App. at 9a. And because the Corps rather than the Port "required" the relocation, state law mandating that the Port must pay for Port-required relocations does not come into play. *See id.* There is a fundamental flaw in this reasoning. While the navigational servitude insulates the federal government from expense, it does not give the Corps authority to rule on cost issues among ***non-federal entities*** or to change a congressionally mandated allocation of ***non-federal expenses***.[7]

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7. The Fifth Circuit's opinion includes a discussion of the court's view on whether the Port had authority under state law to require relocation. Pet. App. at 9a-10a, 13a-14. Because the Fifth Circuit concluded that "Texas law does not apply to the relocation," Pet. App. at 14a, the discussion of the Port's authority under state law is *dicta*. The Fifth Circuit predicated its judgment on a holding that the Corps required relocation rather than the Port. *Id.* at 9a. For the reasons discussed in this petition, the Fifth Circuit's judgment in that regard is erroneous and should be reversed and remanded; upon remand, the Fifth Circuit can address the merits of the state-law issues.

It is no answer to assert that the Owners' rights are subject to § 10 permits requiring Owners to remove obstructions at no cost to the federal government. *Id.* at 14a. The permits are no broader than the navigational servitude itself. *See id.* Because the costs and responsibilities at issue here are entirely non-federal, neither the servitude nor permits tracking the servitude are implicated. Nor is it an answer to assert that WRDA-86 contains no express waiver of the navigational servitude. *See id.* at 16a. Even assuming the absence of an express waiver – which Owners do not concede in light of WRDA-86's unambiguous terms – the analysis does not change because the costs at issue are non-federal and outside any proper application of the navigational servitude. Thus, no waiver is required.[8]

In WRDA-86, Congress assigned responsibility for utility relocations to the local sponsor, not the federal sponsor.

8. The Fifth Circuit attempts to bolster its approval of the Corps' end-run by relying on and extending *United Texas Transmission Co. v. United States Army Corps of Engineers*, 7 F.3d 436 (5th Cir. 1993) ("*UTTCO*"). *See* Pet. App. at 14a-15a. *UTTCO* does not support the use of the navigational servitude in this case because *UTTCO* did not deal with the WRDA-86 requirement that the local public sponsor must "perform or assure performance of" relocations. No issue was presented in *UTTCO* concerning whether the owner necessarily must pay when the servitude is exercised. The pipelines had been relocated, and it was "***not disputed*** . . . that permit-holders must pay for the movement of any portion of the pipeline that is located within the original permit area." *Id.* at 441 (emphasis added). The primary focus of *UTTCO*'s discussion of the navigational servitude was on the Corps' right to revoke the permit of an owner who refused repeated requests to relocate. *Id.* at 439, 445-47. The court concluded that UTTCO should have done precisely what Owners did in this case – relocate, and then seek legal remedies for any appropriate reimbursement. *Id.* at 446-47. In light of these important differences, the Fifth Circuit's reliance on *UTTCO* is unwarranted.

By making this determination, Congress necessarily decided that the navigational servitude, a federal power, would not be asserted to effectuate utility relocations on cost-sharing navigation projects. "Congress may decide, in a particular case, not to assert the navigational servitude." *Lambert Gravel,* 835 F.2d at 1110.

Such is the case with WRDA-86. The plain language of WRDA-86 is susceptible to no other reading, because Congress must be presumed to have been aware of its rights under the navigational servitude. *See, e.g., Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) (the Supreme Court will "presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts"); *St. Louis, I.M. & S. Ry. v. United States*, 251 U.S. 198, 207 (1920); *FDIC v. Faulkner*, 991 F.2d 262, 265 (5th Cir. 1993). Had it been Congress' intent for the federal sponsor to effect the removal of pipelines and other utilities, it would not have assigned the job to the local sponsor.

2. The Fifth Circuit opinion renders WRDA-86's cost-sharing formulas meaningless

In WRDA-86, Congress specified the means by which it would bring financial accountability to federal water projects by placing on the local sponsor a portion of the costs and responsibilities that such projects entailed. *See, e.g.*, S. REP. No. 104-170, at 1 *et seq*. (15R.3984). Congress let WRDA-86 stand unamended in all material respects when it enacted WRDA-96.[9]

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9. The Port and the Corps argued on appeal that WRDA-96 controls cost allocation for the Project and places responsibility for costs on Owners. Pet. App. at 9a. Owners contend that WRDA-86 (Cont'd)

Under the Fifth Circuit's decision in this case, the Corps and the Port nonetheless are free to ignore Congress' express instructions and to evade the cost-sharing requirements of WRDA-86 through *ad hoc* applications of federal authority. There is little reason for local sponsors to shoulder their WRDA-86 responsibilities hereafter. They can simply claim (as the Port claimed here) that they lack authority to cause relocations of pipelines ***at no cost to themselves***, and then ask the Corps to impose relocation costs on owners.

As a result, the cost-sharing formulas of WRDA-86 now are largely meaningless. It should not be so easy to trample congressional policy. *See, e.g., Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 472 (1997) (rejecting agency's proffered interpretation of statutory term on grounds, among others, that acceptance of agency interpretation would leave statute "without any significant effect at all"); *Federal Labor Relations Auth. v. Aberdeen Proving Ground*, 485 U.S. 409, 414 (1988) (reviewing courts "must not 'rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that

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(Cont'd)

controls. The Fifth Circuit did not reach this issue in light of its holding that the Corps' invocation of the navigational servitude negated the state-law cost-allocation mechanism selected in WRDA-86. *Id.*; *see also id.* at 12a ("Because neither WRDA-86 nor WRDA-96 includes a clear Congressional waiver of the navigational servitude, we need not reach which Act controls for cost-sharing"). Because the Fifth Circuit's judgment is erroneous insofar as it allows the navigational servitude to trump the state law mechanism selected by WRDA-86, the Fifth Circuit's judgment should be reversed and this matter should be remanded to the Fifth Circuit for further consideration of the interaction between WRDA-96 and WRDA-86.

frustrate the Congressional policy underlying a statute'") (citing *Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Auth.*, 464 U.S. 89, 97 (1983)).

3. The Fifth Circuit's ruling also contravenes federalism principles

By enacting section 60.102 of the TEXAS WATER CODE, the State of Texas has limited the authority of its component navigation districts; the districts may not undertake projects that require relocations of pipelines unless they pay relocation costs. This is a reasonable choice, but more to the point, it is the State's choice to make.

An interpretation of the federal statutes at issue or of the servitude that conflicts with this policy choice by the State of Texas should be avoided under the Tenth Amendment and principles of federalism. *E.g.*, *Penn Dairies, Inc. v. Milk Control Comm'n*, 318 U.S. 261 (1943) (rejecting contention that the Secretary of War could displace state law governing price of milk sold for Army consumption absent clear congressional intent to displace state law). As the Court emphasized in *Penn Dairies*, "We have recognized that the Constitution presupposes the continued existence of the states functioning in coordination with the national government, with authority in the states to . . . regulate their internal affairs and policy. . . ." *Id.* at 270-71. "An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred. . . ." *Id.* at 275; *see also Texas v. United States*, 730 F.2d 339, 355 (5th Cir. 1984) ("The source of judicially enforceable rights of state sovereignty is not so much the text of the Tenth Amendment as it is the structural assumption of the Constitution as a

whole that the states will remain separate and meaningful decision-making, functioning governmental entities").

To avoid conflict, WRDA-86 and Corps authority should not be construed to override a state-imposed constraint on the powers of its political subdivisions.

II. The Fifth Circuit Erred In Deferring To An Agency Application Of WRDA-86 That Subverts Clear Congressional Intent To Make The Port Responsible For Utility Relocations

The panel opinion compounds the errors described above by deferring to the Corps' assertion of authority under circumstances when no deference is warranted. *See* Pet. App. at 15a-16a.

A. The Corps' Application Of WRDA-86 Contravenes Congressional Intent

No deference is warranted here because the Corps invoked the navigational servitude to impose relocation costs on Owners despite Congress' clear and unambiguous directive in WRDA-86 that the non-federal sponsor must perform or assure performance of utility relocations. The panel thus errs by deferring to a new Corps policy – first adopted in 1995 in anticipation of this dispute – that subverts WRDA-86's clear language and its cost-sharing philosophy.

Since at least April 1986, Corps policy provided that the non-federal sponsor was responsible for utility relocations, notwithstanding the navigational servitude. 21R.5319-20. When it enacted WRDA-86, Congress "continue[d] the

current policy" that the non-federal sponsor was responsible for pipeline and other utility relocations. 15R.3841. For nine years thereafter, the Corps consistently interpreted WRDA-86 to place the responsibility for relocation on the non-federal sponsor. *See, e.g.*, 12R.3279, 3274-75. The project's feasibility study expressly incorporated this policy. 7R.1542 at ¶ 35. Only in the last days of study for the Project did the Corps reverse its position in response to the Port's urging that adhering to the original policy would "kill this project" and that "our partnership has made too much progress to allow this to happen." 12R.3052.

The issue, therefore, never has been whether the Port had the authority to compel relocation – it does. The only issue has been whether the Port had the authority to compel relocation ***at owners' expense***. Continuing to act as partners in a joint enterprise (*e.g.*, 9R.2277), the Corps and the Port agreed to try to shift the costs of the pipeline relocations from the Port to Owners. The rationale for their decision appears in the Corps' Policy Guidance Letter No. 44 (9R.2215-24) ("PGL-44"), cited and discussed in the panel opinion. *See* Pet. App. at 15a.

Because PGL-44 effectively eliminates any possibility that a local public sponsor would pay for a utility relocation, the Corps' action frustrates Congress' clear intent in WRDA-86 that cost allocation was "to be resolved between the non-federal interest and the owners of the facilities being relocated." H.R. CONF. REP. No. 99-1013, at 205 (1986). As a "policy statement," PGL-44 lacks "the force of law" and "does not warrant *Chevron*-style deference." *Christensen v. Harris County,* 529 U.S. 576, 587 (2000). Where the "intent of Congress is clear," as it is in WRDA-86, no deference of any kind is due an agency's divergent interpretation. *Chevron*

U.S.A., Inc., 467 U.S. at 842-43; *General Dynamics Land Sys., Inc.*, 124 S.Ct. at 1248.

B. The Corps' New Interpretation Of WRDA-86 Should Be Rejected In The Absence Of A Clear Indication Of Congress' Desire To Expand The Navigational Servitude

The panel's deference to the Corps is misplaced for the further reason that without "overwhelming evidence of acquiescence" by Congress, courts should be "loath to replace the plain text and original understanding of a statute" with an amended and inconsistent agency interpretation. *Solid Waste Agency,* 531 U.S. at 168-70 & n.5.

The circumstances in *Solid Waste Agency* parallel those present here. This Court rejected a Corps rule extending the definition of "navigable waters" under the Clean Water Act, 33 U.S.C. § 1344(a), to include intrastate waters used as a habitat by migratory birds which cross state lines – including the abandoned sand and gravel pit at issue in the case – because this extension exceeded the Corps' authority under the statute. *Id.* at 167.

In reaching this conclusion, the Court noted that the Corps' later expanded rule and interpretation were inconsistent with the Corps' original 1974 interpretation of the Clean Water Act. Under that earlier interpretation, "'the water body's capability of use by the public for purposes of transportation or commerce'" was "'the determinative factor'" in deciding whether a body of water constituted "navigable waters." *Id.* at 168 (quoting 33 C.F.R. § 209.260(e)(1)).

The Court also underscored its concern regarding unwarranted deference to an agency's statutory interpretation that "invokes the outer limits of Congress' power," cautioning that "we expect a clear indication that Congress intended that result." *Id.* at 172. "This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id.* at 172-73.

Similar concerns arise from the Corps' conduct in the present case. Previous Corps policy had recognized that it was "the basic responsibility of the local [i.e., non-federal] sponsor to assure that utilities are relocated at non-Federal expense." 2R.3279. The Corps then reversed its policy for the purpose of shifting costs from the Port to Owners notwithstanding WRDA-86. 8R.2000A; 9R.2215-2224. This policy shift expands the navigational servitude far beyond authorizing the Corps to remove obstructions without cost to the federal government. The Corps now has claimed authority to reallocate the division of non-federal costs among non-federal entities. As in *Solid Waste Agency*, this Court should reject any "administrative deference" predicated on an interpretation that raises significant questions regarding federalism and the permissible scope of statutory authority. *See* 531 U.S. at 684.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted. The judgment of the court of appeals should be reversed, and this matter should be remanded to the court of appeals for further consideration.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
FILED JANUARY 30, 2004

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 02-20442

AIR LIQUIDE AMERICA CORPORATION; EGP FUELS COMPANY; EQUILON PIPELINE COMPANY, LLC; EXXON PIPELINE COMPANY; FLORIDA GAS TRANSMISSION COMPANY; HOUSTON PIPE LINE CO.; HSC PIPELINE PARTNERSHIP LP; MOBIL CHEMICAL COMPANY, an unincorporated division of Mobil Oil Corporation; MOBIL PIPELINE COMPANY; SEADRIFT PIPELINE CORPORATION; TE PRODUCTS PIPELINE COMPANY LIMITED PARTNERSHIP; TEXAS EASTERN TRANSMISSION CORP.; UCAR PIPELINE INCORPORATED; CHEVRON CHEMICAL CO.; CHEVRON PIPELINE CO.; DYNEGY MIDSTREAM SERVICES; TEPPCO CRUDE OIL LLC,

Plaintiffs-Counter Defendants-
Appellees-Cross-Appellants,

DUKE ENERGY TRANSPORT AND
TRADING COMPANY,

Plaintiff-Counter Defendant-Appellee,

Appendix A

AIR PRODUCTS INCORPORATED; AIR PRODUCTS MANUFACTURING CORPORATION; BLACK MARLIN PIPELINE COMPANY; TEJAS SHIP CHANNEL LLC; TEJAS SOUTH PIPELINE PARTNERSHIP,

Intervenor Plaintiffs-Appellees-Cross-Appellants,

versus

U.S. ARMY CORPS OF ENGINEERS,

Defendant-Counter Claimant-Appellant-Cross-Appellee,

PORT OF HOUSTON AUTHORITY OF HARRIS COUNTY, TEXAS,

Movant-Appellant-Cross-Appellee.

AIR LIQUIDE AMERICA CORPORATION; EGP FUELS COMPANY; EQUILON PIPELINE COMPANY LLC; EXXON PIPELINE CO.; FLORIDA GAS TRANSMISSION COMPANY; HOUSTON PIPE LINE CO.; HSC PIPELINE PARTNERSHIP LP; MOBIL CHEMICAL COMPANY, an unincorporated division of Mobil Oil Corporation; MOBIL PIPELINE COMPANY; SEADRIFT PIPELINE CORPORATION; TE PRODUCTS PIPELINE COMPANY LIMITED PARTNERSHIP; TEXAS EASTERN TRANSMISSION CORP.; UCAR PIPELINE INC.,

Plaintiffs-Appellees-Cross-Appellants,

Appendix A

DUKE ENERGY TRANSPORT AND
TRADING COMPANY,

Plaintiff-Appellee,

versus

PORT OF HOUSTON AUTHORITY OF
HARRIS COUNTY, TEXAS,

Defendant-Appellant-Cross-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

Before BARKSDALE, DeMOSS and BENAVIDES, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

At issue is cost-allocation for privately owned pipelines under the Houston Ship Channel (channel) being relocated as part of the project by the United States Army Corps of Engineers and the Port of Houston Authority to widen and deepen the channel. The Corps and the Port appeal the partial summary judgment awarded the pipeline owners: *inter alia,* the Port was held responsible for the relocation cost. Owners' conditional cross-appeal is from the district court's denial of their alternative summary judgment claim: that the project was for a deep-draft harbor; and that, accordingly, the Port would have to bear half of the relocation cost.

Appendix A

The principal sub-issues are: whether, as held by the district court, the Port must bear the cost, pursuant to TEX. WATER CODE § 60.102 (relocation cost to be borne by district if it "required" the relocation); and, if not, whether, in requiring Owners to relocate the pipelines at their expense, the Corps was properly enforcing both the federal navigational servitude and the Corps' associated federal permit authority.

Texas law does *not* control. Consistent with, *inter alia,* the Corps' well- settled authority to enforce its permits, Owners were required to relocate their pipelines at their expense. Concerning Owners' conditional cross-appeal, the project was *not* for a deep-draft harbor; therefore, the Port was *not* required to bear half of the relocation cost. **VACATED in PART; AFFIRMED in PART; and RENDERED.**

I.

The Rivers and Harbors Act of 1899, 33 U.S.C. § 401 *et seq.,* prohibits construction in navigable waters of the United States unless the work has been approved by the Secretary of the Army. Pursuant to this Act, and for more than 100 years, the Corps has regulated such construction, in part by issuing permits under § 10 of that Act. 33 U.S.C. § 403. These § 10 permits provide, *inter alia,* that pipelines and other structures beneath navigable waters are to be relocated at no expense to the United States if required by federal navigation interests or projects. In the 1940s and 50s, the Corps issued § 10 permits to Owners to install pipelines

beneath the channel. Each permit mandates pipeline-relocation as required by navigation needs and at no cost to the government.

Similarly, when the Texas legislature granted ownership of the land under the channel to the Port in 1927, the Port was given authority to franchise or lease the land for limited periods and purposes. *See* Act of March 11, 1927, 40th Leg., R.S., ch. 292, 1927 Tex. Gen. Laws 437. Accordingly, in addition to a federal § 10 permit, each Owner holds a license from the Port. One license condition is that Owners must relocate their pipelines at their cost if necessary for the channel.

In 1967, the House Committee on Public Works authorized a study for improving deep-draft channels, including the channel. The reconnaissance report for this study was completed in 1980.

The next step was the Water Resources Development Act of 1986 (WRDA-86), Pub.L. No. 99-662, 100 Stat. 4082 (1986); 33 U.S.C. § 2201 *et seq.* It contained the following cost-allocation provision:

> The non-Federal interests [here, the Port] for a [harbor navigation project] *shall perform or assure the performance of all relocations of utilities* necessary to carry out the project, *except that in the case of a project for a deep draft harbor* [deeper than 45 feet] *one-half of the cost* of each such relocation shall be borne by the owner of

> the facility being relocated and one-half of the cost . . . shall be borne by the non-Federal interests.

33 U.S.C. § 2211(a)(4) (emphasis added).

The feasibility study for the project was completed in 1987. In May 1995, the Corps published a draft report for public review that recommended proceeding with the channel's expansion. The draft report stated that Owners would bear the cost for relocation of approximately 130 pipelines. No Owner responded to the Corps about this notice.

The final version of the notice—the Limited Reevaluation Report (LRR)—was published in November 1995. The LRR estimated the pipeline relocation cost would exceed $100 million; and, as did the draft report, the LRR stated that Owners would bear that cost. Again, the Corps received no response from Owners. At the end of the comment period, the LRR was incorporated in the Chief of Engineers' Report (Chief's Report), which was transmitted to Congress by the Secretary of the Army.

The project was authorized by the Water Resources Development Act of 1996 (WRDA-96), Pub.L. No. 104-303, 110 Stat. 3658 (1996); 33 U.S.C. § 2330 *et seq.* That Act provided: "[t]he removal of pipelines and other obstructions that are necessary for the project shall be accomplished at non-Federal expense," ***id.*** § 101(a)(30), 110 Stat. at 3666; and the project would be "substantially in accordance with the plans, and subject to the conditions, described in" the Chief's Report, ***id.*** § 101(a), 110 Stat. at 3662. Again, one condition in that report was for the relocation cost to be borne by Owners.

Appendix A

As required for commencing the project, the Port entered into a Project Cooperation Agreement (PCA) with the Corps in June 1998. 42 U.S.C. § 1962d- 5b(a); *see* Pub.L. No. 99-662, 100 Stat. 4082, 4083 (1986). Shortly thereafter, as requested by the Port, the Corps, by removal-notices to Owners, enforced the § 10 permit conditions and instructed Owners to relocate their pipelines at their expense because of the project's requirements. Owners complied.

In November 1998, however, Owners filed this action, seeking a declaration that the Corps' removal-notices were void. Simultaneously, Owners filed an action in state court, claiming: pursuant to TEX. WATER CODE § 60.102, the Port had "required" the relocation and was therefore responsible for the cost; and the Port's not paying it was an unconstitutional taking. In the alternative, Owners' state action claimed the project was for a deep-draft harbor pursuant to WRDA-86, subject to its mandated cost-sharing among the Port and Owners.

The state action was removed by the Port and consolidated with this action. The Port counterclaimed, seeking a declaration that either WRDA-96 or the § 10 permits required Owners to pay the relocation cost.

In early 2002, on cross-motions for summary judgment, the district court granted partial judgment to Owners, holding: WRDA-96 did not amend the cost-sharing provisions of WRDA-86; pursuant to WRDA-86, state law was to answer the cost-allocation question; under Texas law, that cost was to be borne by the Port; and the licenses issued by the Port (placing cost with Owners) were preempted by Texas law.

Appendix A

The district court amended the Corps' removal-notices to Owners to reflect this ruling. On the other hand, the district court rejected Owners' alternative claim that the project was for a deep-draft harbor.

II.

A summary judgment is reviewed *de novo*. ***E.g., Texas Soil Recycling, Inc. v. Intercargo Ins. Co.***, 273 F.3d 644, 648-49 (5th Cir.2002). The Corps and Port contest the Port's being liable for the relocation cost and the amendment of the Corps' removal-notices. If those rulings are vacated, Owners contest the not-deep-draft-harbor-project ruling.

A.

1.

As the district court concluded, the language in neither WRDA-86 nor WRDA-96 explicitly allocates the relocation cost. The district court ruled that Texas law required the Port to bear it.

Taking a similar approach, Owners contend that WRDA-86, not WRDA-96, establishes the Port's cost liability. Support is found in the WRDA-86 conference report: "This [cost allocation] question is to be resolved between the non-Federal interest [Port] and the Owners of the facilities being relocated." H.R. CONF. REP. No. 99-1013, at 205 (1986). Along this line, Owners claim the Port must bear the cost pursuant to TEX. WATER CODE § 60.102, which provides: "If a district in the exercise of powers conferred by this

subchapter [port improvement] . . . requires the relocating . . . of any . . . pipeline, the relocating . . . shall be done at the sole expense of the district."

The Corps and Port maintain: WRDA-96, not WRDA-86, controls cost-allocation; and WRDA-96 places it on Owners. As discussed in part, *infra,* it is not necessary to resolve whether WRDA-86 or WRDA-96 controls. In any event, TEX. WATER CODE § 60.102 does *not* apply. First, to trigger that section's application, the Port had to "require" the relocation. It did not (and cannot) do so. Second, as discussed *infra,* the federal navigational servitude (applied through the § 10 permits) cannot be "trumped" in the absence of a clear Congressional waiver.

As quoted in part earlier, TEX. WATER CODE § 60.102 provides: "If a district in the exercise of the powers conferred by this subchapter or in the exercise of the power of eminent domain or the police power *requires* the relocating . . . of any . . . pipeline, the relocating . . . shall be done at the sole expense of the district." (Emphasis added.) This provision is not applicable because the Port did not *require* the relocation—the Corps did.

In this regard, the district court held, and Owners contend:

> The Corps issued the removal notices at the Port's request, acting as the Port's agent in requiring the owners to relocate the pipelines. The Port cannot escape its obligation to pay by shunting its order through an agent.

Appendix A

Air Liquide America Corp. et al. v. United States Army Corps of Eng'rs, et al., No. H-98-3982 at 5 (S.D. Tex. filed 25 Jan. 2002).

Under Texas law, for an agency relationship, the agent must be under the control of the principal; "even though one acts for and in behalf of another, if he is not under that other person's control, the relation of agency does not exist." ***Daily Int'l Sales Corp. v. Eastman Whipstock, Inc.***, 662 S.W.2d 60, 64 (Tex. App. 2001). In this instance, agency would require the Port's being "in control" of the Corps; for quite obvious reasons, the Port is not. By requiring removal of an obstacle to a navigable waterway, the Corps was acting pursuant to power delegated to it by Congress. It was pursuant to this power, not the Port's request, that the Corps required the relocation.

Owners contend the Port required removal through the Corps by: undertaking, initiating, and financing the project; signing a PCA with the Corps; and requesting the removal-notices from the Corps. First, the Corps, not the Port, sought Congressional approval for the project. Second, Congress authorized the project and provided the funds for construction of the navigation features, subject to partial reimbursement by the Port. Third, the Port's entering into the required PCA with the Corps in no way establishes that the Port required the relocation. To the contrary, the Port determined that it could not require pipeline relocation at Owners' expense. Therefore, the Port requested the Corps to exercise its § 10 permit authority under the federal navigational servitude.

Owners contend that, but for the Port's partial reimbursement, role in the PCA, and request that the Corps enforce the § 10 permits, there would have been no project. This misunderstands the meaning of "require" in § 60.102. These were necessary components of the project but certainly not sufficient on their own to cause the project to be undertaken. Restated, in order for the Corps and the Port to proceed, an agreement was required — the PCA. The PCA provided that the Corps would accomplish relocation, which it agreed to do through its § 10 permits. The PCA did not require the Corps to exercise its permit authority; and it certainly did not empower the Port to mandate the Corps to require pipeline relocation.

In support of their construction of state law, Owners point to TEX. WATER CODE § 50.052 (now repealed). It provided: if the district *required* relocation or alteration in its construction of any properties, it "shall be done at the sole expense of the district or authority". The Harris County Flood Control District (an entity analogous to the Port) sought an opinion on whether, under § 50.052, it would be required to bear the cost for lengthening a bridge. Texas' Attorney General opined: "[I]f the district widens the channel so as to render the bridge unusable, the district may reasonably be said to have acted to require the 'relocation . . . rerouting . . . or alteration in construction of . . . properties.'" OP. TEX. ATT'Y GEN. No. MW-412 (1981) (citing TEX. WATER CODE § 50.052).

Owners contend that § 60.102 applies to the Port in the same way. This contention neglects a crucial distinction: the Corps, not the Port, required Owners to relocate their pipelines. Similarly, the Port's request for removal-notices

by the Corps did not obligate it to issue them. ***See, e.g., California v. Sierra Club***, 451 U.S. 287 (1981).

2.

The Corps has the authority, under the federal navigational servitude, to require Owners to pay the relocation costs according to the original permits, as necessitated by the project. ***See United Texas Transmission Co. (UTTCO) v. United States Army Corps of Eng'eers*, 7 F.3d 436 (5th Cir.1993), *cert. denied***, 512 U.S. 1235 (1994). Because neither WRDA-86 nor WRDA-96 includes a clear Congressional waiver of the navigational servitude, we need not reach which Act controls for cost-sharing.

Congress derives the power to control navigation from its power to regulate commerce. ***Gibbons v. Ogden***, 22 U.S. (9 Wheat.) 1, 230-31 (1824). This power has been recognized to impose a "navigational servitude", described as follows:

> *All navigable waters are* under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various states and individual owners under them, it is *always subject to the servitude in respect of navigation* created in favor of the Federal government by the Constitution.

Gibson v. United States, 166 U.S. 269, 271-72 (1897) (emphasis added). This servitude operates to the exclusion of any competing or conflicting right. ***See United States v. Virginia Elec. & Power Co.***, 365 U.S. 624, 627-28 (1961).

The navigational servitude includes the right to authorize improvements to harbors and bays, as well as the power to determine what will be deemed an obstruction to navigation. ***See Pennsylvania v. Wheeling and Belmont Bridge Co.***, 59 U.S. (18 How.) 421, 431, 15 L.Ed. 435 (1855). Pursuant to § 10 of the Rivers and Harbors Act of 1899, Congress delegated this power to regulate such obstructions to the Secretary of War (now Secretary of the Army). It bears repeating that each Owner (or predecessor in interest) obtained a § 10 permit prior to construction of its pipeline.

a.

Addressing Owners' "contractual agreement[s]", the district court held: "The licenses [issued by the Port, requiring Owners' to bear relocation cost,] are preempted by the Texas Water Code." ***Air Liquide***, No. H-98-3982 at 5. As discussed *supra*, when title to submerged lands was granted to the Port in 1927, the Texas Legislature gave the Port "the right, power and authority to abate and remove any and all encroachments or structures of any kind now or hereafter existing on said property, *save such as may have been constructed under permit from the United States War Department [later the Corps]*. . . ." Act of March 11, 1927, 40th Leg., R.S., ch. 292, 1927 Tex. Gen. Laws 437, 439 (emphasis added). The licenses issued by the Port provide that, should pipeline relocation be necessary to accommodate deepening and widening the channel, the Owner will, "at its cost and expense and without cost or expense to the Port . . . remove, relocate, lengthen, deepen or otherwise conform" its pipeline to the project.

The district court ruled that Texas law preempted the licenses, in part because "[t]he Port, as a creature of the state, is bound by the regulations the state places on it." ***Air Liquide***, No. H-98-3982 at 5. But, as discussed *supra,* Texas law does not apply to the relocation. Again, the Corps, not the Port, "required" it. The reason the relocation was necessary— the project—was contemplated by the licenses. Through them, Owners agreed that, in the event "any installation [of pipelines] made under authority of this license shall interfere with the widening, deepening or other revision or improvement of the Houston Ship Channel," Owners would bear the relocation cost.

b.

Even if the Port-issued licenses do not control on cost-allocation, Owners would nevertheless be bound by their agreement with the Corps in the § 10 permits. As discussed, because the channel is a navigable waterway of the United States, each Owner had been required, consistent with the federal navigational servitude, to obtain a § 10 permit prior to laying a pipeline. In each permit, Owners: acknowledged they were not receiving an interest in property; and agreed that, should the Corps require, Owners would remove any obstruction (e.g., its pipeline) at no cost to the government.

Our court's decision in 1993 in ***UTTCO*** held that § 10 permit-holders must pay for the relocation of any portion of a pipeline located within the original permit area. ***UTTCO***, 7 F.3d at 441. The permits in ***UTTCO***, as in this action, required removal of obstructions "without expense to the United States," but did not explicitly require owners to bear

the cost. ***Id.*** at 439. Nevertheless, our court held that the federal navigational servitude provided authority to enforce the terms of those permits at owner expense.

> [N]o one seriously contests the rule that the cost of relocating the portion of a pipeline lying between the original banks of the bayou (i.e., the work that was either "herein authorized" under ¶ (*f*) of the permits or covered by the navigational servitude) must be borne by the pipeline owner.

Id. at 444.

It was only after ***UTTCO*** that the Corps, in October 1995, issued written guidance—Policy Guidance Letter 44—for when it will assert its power to require removal of an obstruction to navigation at the expense of the owner of the obstruction. When Texas and the Port determined that they did not have the authority to require relocation of more than 100 pipelines under the navigable waterway, they requested the Corps to secure their relocation under the authority of its federal navigational servitude and the corresponding § 10 permits.

The Chief's Report was then sent by the Corps to Congress concerning this authority and with a specific cost-allocation provision, noting that all relocation costs would be borne by Owners. Congress relied on this report in deciding to approve the project and formally incorporated the Chief's Report in the authorizing legislation — WRDA-96. Pub. L. No. 104-303, § 101(a)(30), 110 Stat. 3658, 3662-66 (1996).

Despite this, the district court ruled: "The adoption of the chief's report went only as far as its engineering and design recommendations, not its admonishments on cost allocation." ***Air Liquide***, No. H-98-3982 at 5. The cost data in the LRR, incorporated in the Chief's Report, reflects, however, that relocation costs are to be borne by Owners. For example, the LRR includes tables listing individual Owners, their specific § 10 permits, and the number and size of their pipelines.

Indeed, portions of the LRR discuss requiring Owners to bear pipeline relocation costs according to the § 10 permit power. (*E.g.*, "The cost for removal and replacement of pipelines and docking facilities located within the area of navigation servitude are not included in the cost estimate because these costs are owner costs, not project costs.")

Owners contend, erroneously, that WRDA-86 precludes the Corps' exercising § 10 permit authority to enforce the navigational servitude. For obvious reasons, Congressional waiver of this servitude must be express. ***See, e.g., United States v. Cherokee Nation of Okla.***, 480 U.S. 700, 707 (1987) (holding waiver of navigational servitude "will not be implied, but instead must be 'surrendered in unmistakable terms'") (quoting ***Bowen v. Public Agencies Opposed to Social Security Entrapment***, 477 U.S. 41, 52 (1986)). There is no waiver in WRDA-86; the federal navigational servitude remains.

In sum, the Corps properly exercised its navigational servitude over the pipelines and waterway covered by the § 10 permits, requiring Owners to remove those pipelines at their expense.

B.

In their conditional cross-appeal, Owners claim the project is for a deep-draft harbor within the meaning of WRDA-86: one "*authorized* to be constructed to a depth of more than 45 feet." 33 U.S.C. § 2241(1) (emphasis added). As discussed, WRDA-86 provides that obstruction relocation costs for a deep draft harbor project are to be divided equally between Owners and the non- Federal interest (here, the Port). 33 U.S.C. § 2211(a)(4).

In support, Owners contend that the design depth of 47 feet for the entrance channel of the project makes it one for a deep-draft harbor. They contend also that over-depth dredging and advance maintenance have resulted in a channel depth greater than 45 feet.

The reasoning by the district court provides the correct answer to these contentions: "The depth of the entrance is *not* the depth of the channel. . . . When it adopted the chief's report, Congress *authorized* the construction of a 45-foot-deep harbor, *not* a deep-draft harbor." ***Air Liquide***, No. H-98-4982 at 4 (emphasis added).

III.

For the foregoing reasons, those parts of the judgment allocating the pipeline relocation cost to the Port and amending the Corps' removal-notices to Owners are **VACATED**; that part of the judgment concerning the project not being for a deep-draft harbor is **AFFIRMED**; and judgment is **RENDERED** for the Corps and Port.

VACATED in PART; AFFIRMED in PART; and RENDERED.

APPENDIX B — OPINION, ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS ENTERED JANUARY 25, 2002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

CIVIL ACTION H-98-3982

AIR LIQUIDE AMERICA CORP., *et al.*,

Plaintiffs,

versus

U.S. ARMY CORPS OF ENGINEERS, *et al.*,

Defendants.

Opinion on Summary Judgment

1. *Introduction.*

The Houston Ship Channel is to be widened and deepened, requiring the relocation of pipelines that pass under it. The owners of the pipelines have been told to move their pipelines at their own expense. The Port of Houston Authority is required by federal and Texas law to pay for the relocation.

2. *Background.*

The Water Resources Development Act of 1996 authorized expansion of the Houston-Galveston Navigational

Channel. The project is to be completed substantially in accordance with the report of the chief engineer of the United States Army Corps of Engineers. The report placed the expense of pipeline removal solely on the pipeline owners; the act says that the removal is to be accomplished at non-federal expense.

The plaintiffs have licenses to run pipelines under the channel. More than 65 pipelines cross beneath the channel, and they must be lowered to complete the project. The average cost of relocation is about one million dollars per pipeline. The pipeline owners agreed in paragraph five of each license to remove or relocate the pipeline at its own cost if the pipeline interferes with the deepening or widening of the channel. At the Port's request, the Corps told the owners to remove the pipelines at their own expense. The owners want the Port to pay for the removals under the general cost allocation plan of the Water Resources Development Act of 1986.

Both sides have moved for summary judgment. The plaintiffs assert that (a) the Corps's notices to remove are void, (b) the Port required the removal under the Texas Water Code, and (c) the Port has taken property without compensation. The Corps challenges the court's jurisdiction to hear the case. The Port claims that the 1996 act assigns the costs to the pipeline owners and that the owners have agreed to remove the pipelines at their own expense.

Appendix B

3. *The 1996 Act.*

The Water Resources Development Act of 1996 authorized the expansion of the ship channel. The act permits a project to be carried out "in accordance with the plans, and subject to the conditions" of the report of the chief of engineers. Public Law No. 104-303, 110 Stat. 3662. The chief's report was not attached to the public law and was not introduced in or debated in Congress, much less adopted by both houses and presented to the president. The act itself—the law—requires that pipeline removal in the Houston-Galveston channel be completed at "non-Federal expense." 110 Stat. 3666. The pipeline owners and the Port are the only two bodies involved in the expansion besides the national government. The statute does not specify a division of costs among the non-federal interests; the chief's report assigns the relocation costs to the owners.

4. *The 1986 Act and the Texas Water Code.*

The Water Resources Development Act of 1986 requires the non-federal interest to relocate or assure the relocation of pipelines as necessary to carry out a project. If the project is a deep-draft harbor, half the cost is paid by the non-federal interest and half by the pipeline owners; no division of costs is specified for projects other than deep-draft ones. 33 U.S.C. § 2211(a)(4). By law, the non-federal interest in this case is the Port of Houston. 33 U.S.C. § 2241(7), 42 U.S.C. § 1962d-5b(b).

If the Port requires the relocations, it does not matter whether it removes the pipelines itself or merely assures that

it is done; the Texas Water Code obliges the Port to pay for the relocations at its sole expense. TEX. WATER CODE § 60.102.

5. *Jurisdiction.*

A. *Federal Court Jurisdiction.*

The Corps asserts that this court lacks jurisdiction; the case should be heard in the Court of Federal Claims because, though their artful pleading hides the claim, the owners implicitly request compensation in excess of $10,000 for pipeline removal. The complaint reveals no artifice. The Corps is not being sued for money damages; the only claims against it are for declaratory relief. This court has jurisdiction.

B. *Standing.*

The Corps claims that the owners do not have standing to sue because their interests are not protected by the 1986 act. The statute, it argues, is meant to set guidelines for the submission of Corps reports, not assign payment obligations. This is incorrect. The 1986 act may be entirely procedural; all laws, from the Constitution down, regulate government processes to some extent. These procedures, however, are in place to protect the interests of citizens and set standards for assigning obligations. The plaintiffs' pipelines cross under the channel. They have been told to move them, which takes planning and money. The Corps cannot issue notices requiring the owners to pay for relocation and then claim that the statute specifying who pays for relocation does not protect the

owners' interests. The owners have a personal stake in the process dictated by the act and have standing to sue.

C. *Final Agency Action.*

The Corps argues that the notices are not final agency action because they do not specify a consequence for noncompliance. Agency action is final if it imposes an obligation. *See United States Dep't of Justice v. Federal Labor Relations Auth.*, 727 F.2d 481, 493 (5th Cir. 1984). The notices to remove require the owners to relocate the pipelines. The implied consequence is seizure of the pipelines through revocation of the licenses to cross the channel. The obligation is immediate and direct because the relocation must be completed by a date certain and the owners must move the pipelines. The removal letters are final agency action.

D. *Ripeness.*

The plaintiffs argue that the notices are invalid because of their depth requirement. The Corps argues that the notices have only a general depth and that the claim will not be ripe for review until it issues permits with a specific depth. The plaintiffs' basic contention, however, is that the notice letters themselves are not valid; it has nothing to do with new permits. The pipelines must be moved to some lower depth. The particular depth ultimately chosen does not matter. The notices require removal of the pipelines; the validity of those notices is clearly ripe for review.

Appendix B

6. *Deep-Draft Harbor.*

The amount paid by the owners and the Port depends on whether the project is a deep-draft harbor. A deep-draft harbor is constructed to a depth of more than 45 feet. 33 U.S.C. § 2241(1). The entrance to the expanded Houston Ship Channel will be 47 feet deep and 800 feet wide. The channel itself is described as 45 feet deep by 530 feet wide. It needs to be dredged to a depth of more than 45 feet for maintenance.

The depth of the entrance is not the depth of the channel. There must necessarily be a transition from the sea floor to the channel bottom; this length is a trivial portion of the entire project. No pipelines cross the entrance. The critical depth is the channel's design depth. When it adopted the chief's report, Congress authorized the construction of a 45-foot-deep harbor, not a deep-draft harbor. Silt accumulates and is dredged; the actual depth of the harbor will vary with the maintenance cycle. No matter how deep the channel must occasionally be dredged to maintain a specific depth, Congress approved a harbor with an official depth of 45 feet; it did not endorse a deep-draft harbor and then require that harbor to be listed as 45 feet deep.

7. *Payment.*

Neither the 1996 nor 1986 acts of Congress explicitly allocate the costs of relocating the pipelines, but Texas law—the same authority that created the Port—says the Port must pay if it requires the removal. TEX. WATER CODE § 60.102. The Port has required the removal by (a) initiating and financing the project, (b) signing a project cooperation

agreement with the Corps, and (c) requesting removal notices from the Corps. The argument that the Port has not "required" the relocation of the pipelines is unsound. The Corps issued the removal notices at the Port's request, acting as the Port's agent in requiring the owners to relocate the pipelines. The Port cannot escape its obligation to pay by shunting its order through an agent.

The defendants argue that the chief's report states that the pipelines will pay for removal, and Congress adopted this recommendation when it mandated in the 1996 act that the project take place in substantial accordance with the chief's report and that pipeline relocation would occur at non-federal expense. This is not correct. Congress authorized the project and design described in the report, not every sentence between the report's covers. The adoption of the chief's report went only as far as its engineering and design recommendations, not its admonishments on cost allocation. The prohibition on federal payment for relocation expenses is not an implicit embrace of the report's payment recommendations; it is a warrant that, though the Port must perform the removal or assure it is performed, the federal government is not going to pay for it.

Congress intended the cost-sharing scheme of the 1986 act to remain in effect; that scheme, after looking to the Texas Water Code, requires the Port to pay for the relocation.

8. *Contractual Agreement.*

The Port argues that the owners agreed in paragraph five of the licenses to pay for the removal of the pipelines at the

Port's request. The licenses are preempted by the Texas Water Code. The statute was passed to limit the power of bodies like the Port to extract payment or performance from groups that contract with them. The Port, as a creature of the state, is bound by the regulations the state places on it. This includes the requirement that the Port pay for any relocation that it requires of a pipeline owner.

9. *Conclusion.*

This court has jurisdiction to hear the suit against the Corps. The Houston Ship Channel project authorized by the Water Resources Development Act of 1996 will not create a deep-draft harbor. The Port has required the removal of the pipelines. The cost-sharing plan created by the Water Resources Development Act of 1986, combined with Texas Water Code, requires the Port to pay for the pipeline relocation. The 1996 act does not require the pipeline owners to pay for the relocation of their pipelines, and the licenses' payment provisions are preempted by the Texas Water Code.

The plaintiffs' motion for summary judgment will be granted in part; the defendants' motions for summary judgment will be denied. The notice letters from the Corps will be amended to require the Port to pay for the pipeline removals. The remaining claims will be dismissed as moot.

Signed January 25, 2002, at Houston, Texas.

s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

CIVIL ACTION H-98-3982

AIR LIQUIDE AMERICA CORP., *et al.*,

Plaintiffs,

versus

U.S. ARMY CORPS OF ENGINEERS, *et al.*,

Defendants.

Order and Final Judgment

1. The plaintiffs' motion for partial summary judgment is granted in part.

2. The Corps's motion for summary judgment is denied.

3. The Port's motion for summary judgment is denied.

4. The notice letters issued by the U.S. Army Corps of Engineers to the plaintiffs are amended to require the Port of Houston Authority to pay for the relocation of the pipelines.

5. All other claims are dismissed without prejudice.

Signed January 25, 2002, at Houston, Texas.

Appendix B

s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED APRIL 1, 2004

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 02-20442

AIR LIQUIDE AMERICA CORPORATION; EGP FUELS COMPANY; EQUILON PIPELINE COMPANY, LLC; EXXON PIPELINE COMPANY; FLORIDA GAS TRANSMISSION COMPANY; HOUSTON PIPE LINE CO; HSC PIPELINE PARTNERSHIP LP; MOBIL CHEMICAL COMPANY, an unincorporated division of Mobil Oil Corporation; MOBIL PIPELINE COMPANY; SEADRIFT PIPELINE CORPORATION; TE PRODUCTS PIPELINE COMPANY LIMITED PARTNERSHIP; TEXAS EASTERN TRANSMISSION CORP; UCAR PIPELINE INCORPORATED; CHEVRON CHEMICAL CO; CHEVRON PIPELINE CO; DYNEGY MIDSTREAM SERVICES; TEPPCO CRUDE OIL LLC;

Plaintiffs - Counter Defendants - Appellees-Cross-Appellants

DUKE ENERGY TRANSPORT AND TRADING COMPANY

Plaintiff - Counter Defendant - Appellee

Appendix C

AIR PRODUCTS INCORPORATED; AIR PRODUCTS MANUFACTURING CORPORATION; BLACK MARLIN PIPELINE COMPANY; TEJAS SHIP CHANNEL LLC; TEJAS SOUTH PIPELINE PARTNERSHIP

Intervenor Plaintiffs - Appellees-Cross-Appellants

v.

US ARMY CORPS OF ENGINEERS

Defendant - Counter Claimant - Appellant-Cross-Appellee

PORT OF HOUSTON AUTHORITY OF HARRIS COUNTY, TEXAS

Movant - Appellant-Cross-Appellee

AIR LIQUIDE AMERICA CORPORATION; EGP FUELS COMPANY; EQUILON PIPELINE COMPANY LLC; EXXON PIPELINE CO; FLORIDA GAS TRANSMISSION COMPANY; HOUSTON PIPE LINE CO; HSC PIPELINE PARTNERSHIP LP; MOBIL CHEMICAL COMPANY, an unincorporated division of Mobil Oil Corporation; MOBIL PIPELINE COMPANY; SEADRIFT PIPELINE CORPORATION; TE PRODUCTS PIPELINE COMPANY LIMITED PARTNERSHIP; TEXAS EASTERN TRANSMISSION CORP; UCAR PIPELINE INC

Plaintiffs - Appellees-Cross-Appellants

Appendix C

DUKE ENERGY TRANSPORT AND TRADING COMPANY

Plaintiff - Appellee

v.

PORT OF HOUSTON AUTHORITY OF HARRIS COUNTY, TEXAS

Defendant - Appellant-Cross-Appellee

Appeals from the United States District Court for the Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Opinion 1/30/04, 5 Cir., _____, _____ F.3d _____)

Before BARKSDALE, DeMOSS, and BENAVIDES, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

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* Judges King, Higginbotham, Jones, Wiener, Dennis, and Clement did not participate in the consideration of the petition for rehearing en banc.

Appendix C

ENTERED FOR THE COURT:

s/ Rhesa H. Barksdale
United States Circuit Judge

APPENDIX D — RELEVANT STATUTE

33 U.S.C. § 2201

§ 2211. Harbors

(a) Construction

(1) Payments during construction

The non-Federal interests for a navigation project for a harbor or inland harbor, or any separable element thereof on which a contract for physical construction has not been awarded before November 17, 1986, shall pay, during the period of construction of the project, the following costs associated with general navigation features:

(A) 10 percent of the cost of construction of the portion of the project which has a depth not in excess of 20 feet; plus

(B) 25 percent of the costs of construction of the portion of the project which has a depth in excess of 20 feet but not in excess of 45 feet; plus

(C) 50 percent of the cost of construction of the portion of the project which has a depth in excess of 45 feet.

(2) Additional 10 percent payment over 30 years

The non-Federal interests for a project to which paragraph (1) applies shall pay an additional 10 percent of the cost of the general navigation features of the project in

cash over a period not to exceed 30 years, at an interest rate determined pursuant to section 2216 of this title. The value of lands, easements, rights-of-way, and relocations provided under paragraph (3) and the costs of relocations borne by the non-Federal interests under paragraph (4) shall be credited toward the payment required under this paragraph.

(3) Lands, easements, and rights-of-way

Except as provided under section 2283(c) of this title, the non-Federal interests for a project to which paragraph (1) applies shall provide the lands, easements, rights-of-way, and relocations (other than utility relocations under paragraph (4)) necessary for the project, including any lands, easements, rights-of-way, and relocations (other than utility relocations accomplished under paragraph (4)) that are necessary for dredged material disposal facilities.

(4) Utility relocations

The non-Federal interests for a project to which paragraph (1) applies shall perform or assure the performance of all relocations of utilities necessary to carry out the project, except that in the case of a project for a deep-draft harbor and in the case of a project constructed by non-Federal interests under section 2232 of this title, one-half of the cost of each such relocation shall be borne by the owner of the facility being relocated and one-half of the cost of each such relocation shall be borne by the non-Federal interests.

Appendix D

(5) Dredged material disposal facilities for project construction

In this subsection, the term "general navigation features" includes constructed land-based and aquatic dredged material disposal facilities that are necessary for the disposal of dredged material required for project construction and for which a contract for construction has not been awarded on or before October 12, 1996.